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SALINA MOHAMAD SUKOR v. MVD INTERNATIONAL SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
VAZEER ALAM MYDIN MEERA J
[ORIGINATING SUMMONS NO: 24NCC-87-10-2017]
18 DECEMBER 2018

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COMPANY LAW: *Derivative action – Application for leave – Action on behalf of company by applicant director – Whether applicant proper and lawful complainant – Whether sufficient notice given to all directors of company of intention to initiate derivative proceedings – Whether applicant had shown genuine and honest concern about wrongdoings – Whether applicant presented an arguable case in interest of company – Companies Act 2016, ss. 347 & 348*

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The plaintiff was a shareholder and director of the first defendant company, MVD International Sdn Bhd ('MVD'), a licensed private agency. The management of MVD was primarily vested in the hands of the second defendant, Paramjeet, the Managing Director ('MD') of MVD and his sister, Parminder, the Chief Executive Officer. Sometime back, Parminder had purchased the entire shares of MVD from the previous owners which were registered accordingly. The plaintiff, who in effect was the nominee of Parminder, complained that Paramjeet, whilst being employed as the MD of MVD, had established a company called Angel Checks Sdn Bhd ('Angel Check') without the knowledge of the other shareholders or directors of MVD and/or Parminder. The shareholders of Angel Check were Paramjeet and his wife, Sohan, each holding 50% shares and Paramjeet was the sole signatory to Angel Check's bank account. Angel Check was involved in the same business as MVD but it did not have the requisite license and had been operating the business from the same premises as MVD, in competition with MVD and in contravention of the law. The plaintiff therefore applied for leave to commence derivative action for the benefit of MVD against Angel Check, Paramjeet and Sohan pursuant to s. 347 and 348 of the Companies Act 2016 ('CA'). The plaintiff contended that Paramjeet, in breach of his fiduciary duty, had failed to act in good faith and in the best interest of MVD where he had placed his personal interest to be in conflict with the interest of MVD.

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H **Held (granting leave in terms of prayers):**

(1) Statutory provisions pertaining to leave to commence derivative action is embodied in ss. 347 and 348 of the CA with the additional provision in s. 347(3) that the right of any person to bring, defend, intervene in, defend or discontinue any proceedings on behalf of a company at common law was abrogated. The plaintiff, by virtue of being a director and a member of MVD, was a proper and lawful 'complainant' for the purposes of s. 347(1). (paras 12 & 16)

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(2) Section 348(2) of the CA provides for the requirement of the 30 days prior notice to be given to the directors of the company. The purpose and function of the notice is 'to give an opportunity to the directors of the company to consider, respond and accede to a request by the complainant for proceedings to be commenced in the name of the company. The plaintiff had sent a notice informing the directors of the plaintiff's intention to initiate derivative proceedings and a period of 30 days had lapsed. Neither the directors nor the defendants responded to the notice. Hence, the mandatory notice requirement under s. 348(2) had been fulfilled. (paras 17 & 18)

(3) The onus was on the defendants to show that the application for leave was made in bad faith or for collateral purpose. Further, where there is an arguable case, it cannot be gainsaid that the plaintiff is acting in bad faith, even if the applicant is advancing self-interest, if the applicant's greater objective is to further the interest of the company as a whole. The presence of private interest does not necessarily negate good faith if the same coincides with that of the company. The defendants had not produced any evidence to show that the plaintiff was acting in bad faith or that the plaintiff's actions were intended for a collateral purpose that amounted to an abuse of process. On the other hand, the plaintiff had shown genuine and honest concern about the wrongdoings of Paramjeet, which would have dire consequences for the company if left unchecked. The plaintiff had clearly set out the wrongdoings and breaches of fiduciary duty and had produced documentary evidence in support of her allegations. Thus, the plaintiff had shown an arguable case against the putative defendants, which was *prima facie*, in the interest of the company. (paras 19 & 20)

(4) At the leave stage, the court should not go into the merits of the case. The applicant is only required to show that there is some substance on the grounds supporting the applicant. This, the plaintiff had established and the plaintiff's application was not frivolous. The plaintiff had fulfilled the requirements under s. 347 and 348 of the CA and had presented an arguable case that warranted further investigation. Hence, leave was granted to the plaintiff to commence a derivative action on behalf of MVD. (paras 16 & 22)

Case(s) referred to:

Abdul Rahim Suleiman & Anor v. Faridah MD Lazim & Ors [2017] 1 CLJ 633 CA ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Independent Oil Tools Ltd v. Dato' Ramli Md Nor & Ors [2018] 5 CLJ 706 HC ***(refd)***
Lembaga Tabung Angkatan Tentera v. Prime Utilities Bhd [2013] 8 CLJ 38 HC ***(refd)***
Mohd Shuaib Ishak v. Celcom (Malaysia) Bhd [2008] 1 LNS 314 HC ***(refd)***
Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor [2015] 10 CLJ 599 HC ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:
Companies Act 1965 (since repealed), ss. 181A, 181B(4)(a), 181E
Companies Act 2016, ss. 345, 347(1), (3), 348(2), (4)

For the applicant - M/s Jasbeer Nur & Lee
For the respondent - M/s Rajan Navaratnam

Reported by S Barathi

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] This is the plaintiff's application for leave to commence derivative action, as a director and shareholder of the first defendant company, MVD International Sdn Bhd ("MVD"), for the benefit of the first defendant against Angel Checks Sdn Bhd (Company No. 1194578-U), Paramjeet Singh a/l Teja Singh (IC No. 690917-08-5511) ("Paramjeet") and Sohan Delvinderjit Kaur (IC No. 710427-08-5880).

[2] The application for leave is made pursuant to ss. 347 and 348 of the Companies Act 2016, which provide as follows:

347 Derivative proceedings

(1) A complainant may, with the leave of the Court initiate, intervene in or defend a proceeding on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

348 Leave of Court

(1) An application for leave of the Court under section 347 shall be made to the Court without the need for an appearance to be entered.

(2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of Court under section 347.

(3) Where leave has been granted for an application under section 347, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not the leave shall be granted, the Court shall take into account whether:

(a) the complainant is acting in good faith; and

(b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

(5) Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the Court.

[3] By way of background facts, the plaintiff is a shareholder and director of MVD. The plaintiff holds 525,000 shares (35%) in MVD. The other shareholders of MVD are, Zarifah binti Haron ("Zarifah") who owns 525,000 shares (35%), and Hardev Singh a/l Pritam Singh ("Hardev") who owns 450,000 shares (30%). The other two directors of MVD, apart from the plaintiff, are Zarifah and Hardev.

[4] MVD is a licensed private agency under the Private Agencies Act 1971, and carries on the business of providing security guards, private investigations and protection for the personal safety and security of persons, property or business and related services. The management of MVD was primarily vested in the hands of the second defendant, Paramjeet, who was employed and designated as the Managing Director of MVD and also his sister Parminder Kaur a/p Teja Singh (IC No. 720328-08-5438) ("Parminder"), who was designated as the Chief Executive Officer.

[5] Sometime back, Paramjeet and Parminder had purchased the entire shares of MVD from the previous owners, Venodevan a/l Mariemuthu and Mariemuthu a/l Tharmalingam, and had them registered in the manner shown in para. [3] above.

[6] The plaintiff, who in effect is the nominee of Parminder, complains that Paramjeet, whilst being employed as Managing Director of MVD, had established a company called Angel Checks Sdn Bhd (Company No. 1194578-U) ("Angel Check") on 14 July 2016, without the knowledge of the other shareholders or directors of MVD and/or Parminder. The shareholders of Angel Check are Paramjeet and his wife Sohan Delvinderjit Kaur ("Sohan"), each holding 50% shares. The directors of Angel Check are also Paramjeet and Sohan. Paramjeet is the sole signatory to Angel Check's bank account.

[7] Angel Check is involved in the same business as MVD, ie, the private agency business. Angel Check does not have the requisite license under the Private Agencies Act 1971 to offer security services as a private agency. Nevertheless, Paramjeet has been operating Angel Check's business from the same premises as MVD, in competition with MVD and in contravention of the law.

[8] The plaintiff states that Paramjeet, in his capacity as director of MVD owes the company a fiduciary duty:

(a) to act with good faith and in the best interest of MVD; and

(b) not to put himself in a position of conflict of interest *vis-à-vis* the company.

[9] Plaintiff contends that, in breach of his duty of fiduciary, Paramjeet had failed to act in good faith and in the best interest of MVD, where he had placed his personal interest to be in conflict with the interest of MVD, and in particular:

(a) forming Angel Check whilst being employed as Managing Director of MVD and conducting identical business, namely security and investigation services, from the same premises in competition with MVD;

(b) carrying on Angel Check's business illegally without proper and valid license from MVD's premises thus jeopardising MVD's legal status and license;

(c) concurrently marketing Angel Check's services together with that of MVD and intentionally pricing Angel Check's services below that of MVD thus encouraging customers to move to Angel Check;

(d) syphoning MVD's business to Angel Check by falsely representing to potential customers and existing customers that Angel Check and MVD were sister companies, and transferring customers from MVD to Angel Check to the detriment of MVD;

(e) using employees under MVD's payroll to run Angel Check's business; and

(f) deliberately causing MVD's customers to deposit payments or income belonging to MVD into his personal account, without authorisation from MVD and dishonestly retaining these monies/income for himself and refusing to account for the same to MVD.

[10] The plaintiff further contends that Paramjeet's actions were *mala fide* and done with the sole intention to hurt and/or injure and/or cause loss to MVD, and were contrary to the common law and statutory duties prescribed under the Companies Act 2016; and that the other directors and shareholders, who were Paramjeet's nominees and aligned to him, and who at all times were aware of Paramjeet's unlawful conduct and breaches of fiduciary duty had deliberately failed to take any action to safeguard the interest of MVD. Hence, the plaintiff states that there is a necessity to commence a derivative action on behalf of MVD against Paramjeet, Angel Check and the other putative defendant named above.

[11] Having considered the application and affidavits filed and having heard and read the submissions of counsel, I had allowed the plaintiff's application in encl. 1 for the following reasons.

[12] Prior to the coming into effect of the Companies Act 2016, the law governing leave to commence derivative action was contained in ss. 181A and 181B of the now-repealed Companies Act 1965. The courts had also applied the common law rights to commence derivative action in considering such applications. Presently, that statutory provision is embodied in ss. 347 and 348 of the Companies Act 2016, with the additional provision in s. 347(3) that the right of any person to bring, defend, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

[13] Hence, all previous cases authorities in respect of leave to commence derivative action under the previous ss. 181A and 181B of the Companies Act 1965, may still be referred to for guidance except for cases that concerns the common law derivative rights. This was confirmed by my learned brother Azizul Azmi Adnan J in *Independent Oil Tools Ltd v. Dato' Ramli Md Nor & Ors* [2018] 5 CLJ 706 in the following terms:

> The recently introduced Companies Act 2016 maintains the substance of the previous ss 181A to 181E of the Companies Act 1965, with one critical difference, the common law right to commence or defend a derivative action has now been abrogated.

[14] In *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808, Abdull Hamid Embong JCA (as he then was) explained the rationale for derivative action thus:

> The intention of ss. 181A to E of the CA is to enable a member, present or past, to seek leave to bring an action in the name of the company to recover losses sustained by that company. As such, leave to bring a derivative action must not be given lightly (see *Swansson v. R.A. Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character. In this respect, the learned judge was wrong in stating cursorily that the matter before him was "only an application for leave" and relying on the low threshold used under O. 53 RHC (application for judicial review) ie, to determine if an application for judicial review is not frivolous or vexations by relying on cases like *Clear Water*. The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s. 181A of the CA are met. A low threshold of merely determining if there existed a *prima facie* case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s. 181A of the CA, and compliance to those statutory requirements. (see *Charlton v. Babe*r 21 ACIC 1671).

[15] In *Lembaga Tabung Angkatan Tentera v. Prime Utilities Bhd* [2013] 8 CLJ 38, a minority shareholder had filed for leave to commence derivative action pursuant to ss. 181A, 181B and 181E of the Companies Act 1965, and the High Court in granting leave held that:

A In deciding whether or not leave should be granted the plaintiff as the complainant must show to the court that the requirements pursuant to s. 181B has been complied:

(a) a 30 days notice in writing has been given to the directors of his intention to apply for the leave of the court;

B (b) the complainant is acting in good faith; and

(c) it appears *prima facie* to be in the interest of the company that the application for leave is granted.

And the Court of Appeal in *Abdul Rahim Suleiman & Anor v. Faridah MD* C *Lazim & Ors* [2017] 1 CLJ 633 affirmed that approach and had held that:

(i) in deciding whether or not leave ought to be granted, require the court to take into account whether:

(i) the complainant is acting in good faith; and

D (ii) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

Accordingly, it does indeed go without saying that where the requirements under both ss. 181A and 181B of the Act are fulfilled, the complainant and in this case, the appellants, ought to be given leave to commence on behalf and in the name of the company namely the eighth E respondent derivative actions as prayed for in their originating summons.

[16] In applying these principles, I find that the plaintiff has fulfilled the requirements under ss. 347 and 348 of the Companies Act 2016 for leave to be granted to the plaintiff to commence a derivative action on behalf of MVD. Section 347(1) states that:

F (1) A **complainant** may, with the leave of the Court initiate, intervene in or defend a proceeding on behalf of the company.

The plaintiff, by virtue of being a director and a member of MVD, is a proper and lawful 'complainant' for the purposes of s. 347(1), for a 'complainant' G is defined in s. 345 of the Companies Act 2016 as follows:

For the purposes of this Division, "complainant" means:

(a) a **member of a company**, or a person who is entitled to be registered as a member of a company;

H (b) a former member of a company if the application relates to the circumstances in which the member ceased to be a member;

(c) any **director of a company**; or

(d) the Registrar, in the case of a company declared under section 590.
(emphasis added)

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[17] Now, the other mandatory requirement for leave to be granted is stipulated in s. 348(2) of the Companies Act 2016, which is the requirement of the 30 days' prior notice to be given to the directors of the company. Section 348(2) provides:

> (2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of Court under section 347.

The purpose and function of a notice under s. 348(2) of the Companies Act 2016 is to "give an opportunity to the directors of the company to consider, respond and accede to a request by the complainant for proceedings to be commenced in the name of the company". *Independent Oil Tools Ltd v. Dato' Ramli Md Nor & Ors* [2018] 5 CLJ 706.

[18] The defendants contend that no such prior notice under s. 348(2) was given to the directors. However, the plaintiff contends otherwise. The plaintiff had sent a notice dated 29 August 2017 ("notice") informing the directors of the plaintiff's intention to initiate derivative proceedings contemplated herein. The said notice was served on the directors, as well as the second defendant, by way of registered post. The notice and proof of postage is exhibited marked as exh. SMS22 in the affidavit of the plaintiff dated 5 October 2017. A period of 30 days had lapsed, and neither the directors nor the defendants responded to the notice. Hence, I am satisfied that the mandatory notice requirement under s. 348(2) has been fulfilled.

[19] The next requirement is the requirement that the application for leave be made in good faith and in the best interest of the company as stipulated in s. 348(4) that reads:

> (4) In deciding whether or not the leave shall be granted, the Court shall take into account whether:
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> (a) the complainant is acting in good faith; and
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> (b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

In *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808, the Court of Appeal, in respect of the element of good faith in an application for leave under s. 181B(4)(a) held as follows:

> The second crucial requirement for the determination of the court in granting leave is the need for the respondent to show that he was acting in good faith in making this application. (s. 181B(4)(a)). The onus of proof here is on the respondent on a balance of probabilities. The test of good faith is two-fold. One is an honest belief on the part of the respondent, and two, that this application is not brought up for a collateral purpose.

The onus, is thus, on the defendants to show that the application for leave is made in bad faith or for collateral purpose. See *Lembaga Tabung Angkatan Tentera v. Prime Utilities Bhd* [2013] 8 CLJ 38. In this regard, it is worthy of note that the defendants have not produced any evidence showing that the plaintiff is acting in bad faith, or that the plaintiff's actions are intended for a collateral purpose that amounts to an abuse of process.

[20] Further in *Mohd Shuaib Ishak v. Celcom (Malaysia) Bhd* [2008] 1 LNS 314, Ramly Ali J (as he then was) in considering the issue of good faith adopted and applied the following principle:

> The test for good faith was dealt with by the Supreme Court of British Columbia in *Primex Investments Ltd v. Northwest Sports Enterprise* [1995] CanLII 717 (BC S.C.), where the Court considered the requirement under section 225 of the B.C. Company Act in an action where the Petitioner applies for leave to bring a derivative action in the name of Northwest Sports Enterprise Ltd against several of its current directors, together with companies in which some of them have an interest. Mr. Justice Tysoe in finding the applicant acted in good faith appears to tie the requirement of "good faith" to the test of the "interest of the company". *He stated that were there is an arguable case, the applicant cannot be said to be acting in bad faith because he wants the company to pursue what he genuinely considers to be a valid claim. In that case, there was no evidence the applicant was using the prospect of a derivative action as a threat in order to extract some advantage from the company.* Tysoe J. also indicates that *an applicant advancing self interest is not necessarily acting in bad faith.* (emphasis added)

Hence, where there is an arguable case, it cannot be gainsaid that the plaintiff is acting in bad faith, even if the applicant is advancing self interest, if the applicant's greater objective is to further the interest of the company as a whole. The presence of a private interest does not necessarily negate good faith if the same coincides with that of the company. See *Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor* [2015] 10 CLJ 599; [2015] 11 MLJ 604. The plaintiff has shown genuine and honest concern about the wrongdoings of Paramjeet, which would have dire consequences for the company if left unchecked. The plaintiff has clearly set out Paramjeet's wrongdoings and breaches of fiduciary duty and have produced documentary evidence in support of her allegations. Despite the other directors being notified of Paramjeet's alleged breaches of fiduciary duty, the other directors have not taken any action to enquire into the complaint or take any action to safeguard the company's interest. Instead, the other directors have sought to appoint Paramjeet to the board of directors. Thus, I find that the plaintiff has shown an arguable case against the putative defendants, which is *prima facie* in the interest of the company.

[21] Gopal Sri Ram JCA (as he then was) in the case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 said that in considering a leave application, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. All that is required for the applicant to show is that there is some substance in the grounds supporting the application. This, I find, the plaintiff has established. I do not find the plaintiff's application to be frivolous.

[22] Additionally, the court should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law. See *Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627 SC. Having considered the evidence as a whole, I find that the plaintiff has fulfilled the requirements of s. 348 of the Companies Act 2016 and has presented an arguable case that warrants further investigation. Hence, leave was granted in terms of the prayers in the originating summons as in encl. 1 with cost of RM12,000 to be borne by the defendants.